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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

COUNTY OF ORANGE, Plaintiff and Respondent, v. SAFETY NATIONAL CASUALTY CORPORATION, Defendant and Appellant.	G043366 (Super. Ct. No. 05CM10269) O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County, Elaine Streger and Erick L. Larsch, Judges. Affirmed.

Nunez & Bernstein and E. Alan Nunez for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel and Nicole M. Walsh, Deputy County Counsel, for Plaintiff and Respondent.

Safety National Casualty Company (Safety National) appeals from an order denying its motion to vacate forfeiture of its bail bond and exonerating the bail, and from the ensuing summary judgment entered on the bond. Safety National contends the court lost jurisdiction over the bond when it failed to declare a forfeiture on the first occasion the defendant, Mahmoud Quher, did not personally appear for his arraignment. We find the contention not only unpersuasive but borderline frivolous. The charge against the defendant was a misdemeanor probation violation, and the general rule is that a defendant may "appear" through counsel for arraignment in such a case. At the earlier hearing, Quher did appear through counsel, and the court explicitly noted his own presence was waived. Consequently, there was no occasion to declare a forfeiture of the bond in connection with that earlier hearing.

The judgment and order are affirmed.

FACTS

The record in this case is thin, but includes a copy of the docket for Quher's case. That copy indicates that while none of the problems with which we are concerned arose until October, Quher had his first arraignment hearing in April of 2008, and appeared in propria persona. He was advised of his rights and the court appointed the public defender to represent him. He denied the charge and the court set bail at $10,000 and set the case for a "Disposition and Reset" on May 15, 2008.

On May 15, 2008, Quher appeared with a new attorney, substituting in as retained counsel. The docket reflects he was accused of: (1) failing to make a $100 payment; (2) failing to enroll in Multiple Offender Alcohol program; and (3) failing to report to Orange County Jail for a 60-day jail sentence. The Disposition and Reset was continued to June 23, 2008.

On June 23, Quher again appeared with retained counsel, waived statutory time for probation violation and the hearing was continued to the next day.

On June 24, Quher appeared through counsel and the court noted his personal appearance at the hearing was waived pursuant to Penal Code section 977, subdivision (a).[1] However, for reasons not set forth in our record, the docket also reflects the court issued a bench warrant for Quher that same day, and ordered his bond forfeited.

On August 13, 2008, the court set an arraignment hearing for the probation violation. Quher appeared through counsel, and the court again waived his personal appearance pursuant to section 977, subdivision (a). Quher moved to recall the arrest warrant and set bail. The motion was denied. The arraignment was set for the following day, August 14, 2008.

On August 14, 2008, Quher appeared again though counsel, and the court again waived his personal appearance pursuant to section 977, subdivision (a). The case was apparently continued to October 15, and then October 17, 2008.

On October 17, Quher appeared without counsel. The docket reflects both that he was formally arraigned and that he waived the right to be arraigned that day. The court continued the hearing to October 20, "so that it can be verified if Defendant has retained counsel Maltaise Cini," set bail in the amount of $25,000 and ordered Quher to appear at the continued hearing. The court also vacated the earlier bail bond forfeiture.

On October 18, Quher obtained his new bail bond in the amount of $25,000 from Safety National, although the bond was not filed with the court until October 21, 2008. The minute order from the arraignment hearing on October 20, 2008, reflects that

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1 Penal Code section 977, subdivision (a) governs the manner in which a defendant may "appear" for arraignment in a criminal case involving a misdemeanor charge. The subdivision provides in pertinent part that "(1) In all cases in which the accused is charged with a misdemeanor only, he or she may appear by counsel only, except as provided in paragraphs (2) and (3). . . . [¶] (2) If the accused is charged with a misdemeanor offense involving domestic violence, as defined in Section 6211 of the Family Code, or a misdemeanor violation of Section 273.6, the accused shall be present for arraignment and sentencing, and at any time during the proceedings when ordered by the court for the purpose of being informed of the conditions of a protective order issued pursuant to Section 136.2. [¶] (3) If the accused is charged with a misdemeanor offense involving driving under the influence, in an appropriate case, the court may order a defendant to be present for arraignment, at the time of plea, or at sentencing."

All further statutory references are to the Penal Code.

Quher was not present in court, but was represented by Attorney Cini, and again, that his personal presence was "waived pursuant to [section] 977(a)." The order also reflects the case was set for a "Disposition and Reset" on October 28, 2008, and that Quher was ordered to appear at that hearing.

On October 28, Quher was not present for the hearing, and the court relieved Cini as his counsel of record. The court issued a bench warrant for Quher, and ordered the bail bond issued by Safety National forfeited.

On November 25, 2009, Safety National moved to vacate the forfeiture of the bond, arguing the court's failure to declare the bond forfeited when Quher failed to personally appear on October 20, meant the court lost jurisdiction and could not thereafter declare a forfeiture.

Respondent, the County of Orange, opposed the motion to vacate. Although it acknowledged the law provided that a court's "failure to immediately declare a forfeiture upon a bailee's unjustified nonappearance deprives that court of jurisdiction to declare a forfeiture at a later date," the County argued that no such "unjustified nonappearance" had occurred prior to October 28, 2008. Section 977, subdivision (a) specifically permitted defendant in a misdemeanor case to appear at arraignment through counsel, and the court explicitly accepted that mode of appearance at the October 20 hearing. Consequently, there was no basis to declare any forfeiture of the bond on that date.

The court denied the motion to vacate.

DISCUSSION

Safety National argues the court erred in denying the motion to vacate the forfeiture and exonerate bail, because the record reflects Quher "fail[ed] to appear" on October 20, 2008, and the court's failure to declare his bail forfeited at that time resulted in a loss of jurisdiction to do so when he again failed to appear on October 28, 2008. We

find the contention unpersuasive because we cannot agree with the core assertion that Quher failed to "appear" at the October 20 hearing.

As with all appeals, we must presume the evidence supported the court's judgment, and it is appellant's burden to affirmatively show otherwise. Appellant "has the burden of affirmatively showing error by an adequate record." (*Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 369.) In this case, the record is simply inadequate to demonstrate that Quher did not "appear" at the arraignment hearing on October 20, 2008.

As we have already noted (see fn. 1, *ante*), section 977, subdivision (a), states the general rule that in cases in which the defendant is charged with a misdemeanor only, he or she may "appear by counsel" at a hearing. As explained in *People v. American Bankers Ins. Co.* (1987) 191 Cal.App.3d 742, 746, the purpose of the statute is to grant "defendant in a misdemeanor proceeding . . . a statutory right to be absent."

In light of this general rule, the court's order (as reflected in the docket entry), on October 17, 2008, that Quher must "appear" at the October 20, 2008 arraignment hearing, cannot reasonably be read to demonstrate the court meant he was obligated to appear *personally*, and could not avail himself of his right to appear through counsel. If the court said such a thing at the October 17 hearing, or specifically indicated such a requirement in its minute order, it was incumbent upon Security National to include either the reporter's transcript reflecting the oral statement, or the minute order reflecting the requirement. But neither is included in our record.

In the absence of any evidence the court specifically required Quher to appear *personally* at the October 20 hearing, we must presume the court intended that he be entitled to avail himself of the right to make his appearance through counsel. (See *People v. American Bankers Ins. Co., supra*, 191 Cal.App.3d at p. 745 ["Because the record is silent as to what defense counsel may have stated to the court when the bail was forfeited, we must presume that the evidence supports the judgments."].)

And significantly, the court's October 20 minute order, in which it explicitly notes that Quher was not present at the hearing, and that his presence was "waived pursuant to [section] 977(a)," squarely supports the presumption the court did not believe Quher had been required to attend that hearing personally.

Because our record contains no evidence whatsoever suggesting the court meant to deprive Quher of the statutory right to "appear" at the October 20, 2008 hearing, through counsel, and it is undisputed he did "appear" at that hearing through counsel, there is simply no basis to conclude his bail was subject to forfeiture at that time, and thus that the court lost the right to declare a forfeiture in the future. Consequently, Security National has failed to demonstrate the court erred in denying its motion to vacate the forfeiture.

The judgment and order are affirmed, and the County of Orange is to recover its costs on appeal.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.